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No. 740

In the Supreme Court of the United States

OCTOBER TERM, 1958

ELLA V. FORE, APPELLANT

v.

JAKOBINE TOTH, APPELLEE

On Appeal from the Supreme Court of Ohio

Motion to File Brief and Brief Of the State of Louisiana, Appearing Amicus Curiae In Support of Appellant

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

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On Appeal from the Supreme Court of Ohio

MOTION TO FILE BRIEF

Comes now the State of Louisiana, through its Attorney General, and begs leave to file brief amicus curiae in support of Appellant herein.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.

April, 1959

PRELIMINARY STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio entered on January 14, 1959, denying her Application for Rehearing from the judgment of that Court entered on December 24,

1958, setting aside the judgment of the Court of Appeals for the Eighth District, Cuyahoga County, Ohio.

A complete summary of the opinions below, jurisdiction of this Court and a statement of the facts and questions presented by this case is contained in the appeal previously filed by appellant in this Court, to which the State of Louisiana respectfully makes reference.

The appellant, Ella V. Fore, is a citizen and resident of the State of Louisiana. She is duly qualified by the Fifth Judicial District Court of the State of Louisiana, Parish of Franklin, as tutrix (guardian) of the person and property of Donald Peter Fore, her minor grandson, the sole surviving child of her son, Donnie R. Fore. Before his death, appellant's son had his domicile in the State of Louisiana, and appellant's grandchild has his present domicile in the State of Louisiana.

The State of Louisiana appears before this Court as amicus curiae in support of the appeal of Mrs. Ella V. Fore, Appellant, and submits this brief in accordance with Rule 42 of the Revised Rules of this Court.

THE FACTS

Donnie R. Fore, a Master Sergeant in the United States Army, and his wife were tragically killed in an automobile accident near Ingrandes, France, on September 7, 1957. Their only child was Donald Peter Fore. The Appellee, a resident of Cleveland, Ohio, is the sister of the deceased mother of the minor child. The Appellee went to Europe for the funeral of her

sister, and, while there, succeeded through legal counsel in convincing the Army authorities in France to permit her "to escort" the minor child to the United States. During the same period of time, appellant was making arrangements to receive the child. Appellee, however, returned with the child to Cleveland, Ohio, and in an ex parte proceeding, without notice to anyone, was awarded custody of the child by the Probate Court of Cuyahoga County, Ohio.

Appellant thereafter learned of the whereabouts of the child, qualified as the tutrix of the child under Louisiana law in the court of the child's Louisiana domicile, and brought a habeous corpus proceeding in the Court of Appeal of Cuyahoga County, Ohio, for custody of the child. That Court awarded custody to Appellant, but was reversed by the Supreme Court of Ohio. This appeal is from the decision of the Supreme Court of Ohio.

These are the primary facts of this case, stated in more detail by Appellant in her appeal.

THE INTEREST OF THE STATE OF LOUISIANA

Not only is Appellant a citizen of Louisiana, but she is duly qualified tutrix of the person and property of the minor child, Donald Peter Fore. The Court which qualified Appellant as tutrix is not only the Court of her domicile, but the Court of the domicile of Appellant's deceased son and of the domicile of the minor child. There is no serious question but that the domicile of all of these persons was in the Parish of Franklin, State of Louisiana. Notwithstanding the

facts and law of domicile, the Supreme Court of Ohio has awarded custody of this Louisiana child to a resident of Ohio. In so doing, that Court has ignored the law of Louisiana, the law of conflicts of law and the Constitution of the United States. The interest and concern of the State of Louisiana in this case is for the protection of its citizens against deprivation of rights accorded them under the law of domicile, and in the enforcement of its statutes in that regard and in the judgment aforesaid rendered by a Court of the State of Louisiana.

THE DECISION APPEALED FROM, AND ITS IMPORTANCE

The Supreme Court of Ohio has held in this case that irrespective of the Louisiana domicile of this child, the State of Ohio has jurisdiction to award custody of the child in an ex parte proceeding, and that refusal to recognize the judgment of the Court of the Louisiana domicile of the child does not offend the Full Faith and Credit Clause of the United States Constitution.

The State of Louisiana asserts that the judgment of the Supreme Court of Ohio is erroneous, and implicit in the decision are important choices of policy which affect not only proper relationships between the States of the Union, but also rights of citizens of the several states. The attention and guidance of this Court are required to determine these matters of policy, not only for courts of law, but, also, under the facts of this case, for proper administration of persons and

dependents of persons serving in the Armed Forces of the United States.

OHIO'S THEORY OF JURISDICTION, AND WHY IT IS ERRONEOUS

The Supreme Court of Ohio states in its opinion, 168 Ohio St. 363:

> "Unless compelled by some **Ohio statute** to find to the contrary, we are of the opinion that the Ohio court had **inherent jurisdiction** to determine the custody of Donald, **irrespective** of his domicile." Id. at p. 367 (emphasis added).

It is at once apparent that this conclusion is directly contrary to established jurisprudence. See opinion of Court of Appeals of Cuyahoga County in this case, 151 N.E. (2d) 777, 79 Abs. 15; Restatement of Conflict of Laws, Sections 117, 144, 149 and 151; Annotation, 4 A.L.R. 2d 7; *Lehmer v. Hardy*, et al., 294 Fed. 407; *Shorter v. Williams*, 74 Ga. 539; *In the Matter of the Appointment of a General Guardian of Maude and Mabel Hubbard, Infants*, 82 N.Y. 90.

These authorities, and others, stand for the proposition that the state of a child's domicile has exclusive jurisdiction to determine custody.

The Supreme Court of Ohio all but conceded that it was announcing a novel theory in this case, when it stated:

> "Part of the genius of the law is that old 'rules' give way to new ones which better reflect the basic principles which undergirded the former." 168 Ohio St. 363 at p. 368.

To justify announcement of its "new rule," the Court reasoned that the only connection between this child and Louisiana rests on a tenuous and technical idea of domicile; that in an abnormal situation, such as the present one where both parents are dead, the trial judge should be guided not so much by legalistic formulae as by considerations which have a bearing upon the ultimate interests of the child; that whereas formerly the domicile was the center of a family's life and exclusive jurisdiction was in the court of domicile for that reason, in these days of mobility of population, wherever a child is found may be where his interests are centered, and the welfare of society and of the child demand that jurisdiction be permitted to the place of physical presence of the child; that this concep. has its origin in protection of the helpless; that while Ohio does not consider domicile unimportant on the **merits** of a case of this kind, the issue in this case is **jurisdiction,** which must be supported according to the best interests of the child.

The State of Louisiana submits that the reasoning of this decision is spurious under the facts of this case, deserving refutation by the considered judgment of this Court.

The Supreme Court of Ohio considers that only a tenuous and technical idea of domicile connects this child with Louisiana. The place of birth of this child's father and place of residence of this child's grandmother, his closest living relative in the United States, is brushed aside as a tenuous and technical idea. It

is evident that the position taken by the Ohio court is not that Appellant asserts a tenuous and technical idea of domicile, but that domicile is a tenuous and technical idea. Such a view is indeed revolutionary, and opens an unchartered path to legal uncertainty. If domicile is not important here, why is it important in any field of law? The many personal rights and obligations of great consequence presently determined by domiciliary law—how personalty is divided intestate estates, validity of wills, establishment of legitimacy, personal taxation, validity of marriage and divorce and the right to vote, to name a few examples—can hardly be properly distinguished from determination of custody, insofar as they all depend upon the exclusive application of the law of domicile.

The view taken by the Ohio court is less realistic and less understandable when it is realized that the only connection between this child and Ohio is the physical presence of the child in Ohio. The child is there because of the chance administrative decision by an Army officer in France, albeit as the result of the stratagem of Appellee.

The Ohio theory goes further, however, and states that jurisdiction should attach under these facts because of considerations which have a bearing upon the ultimate interests of the child.

The ex parte Ohio guardianship proceedings, however, **did not consider** the best interests of this child. Appellant, Mrs. Fore, was certainly given no notice, and the Probate Court of Cuyahoga County, Ohio,

merely granted the application of guardianship without any question being raised as to the interests of the child. The Probate Court knew that the closest living relative of the child in the United States was his paternal grandmother, and, ignoring this fact, granted the application. There is no evidence that Jakobine Toth was better able to take care of the child in any way.

If it be said that the Probate Court need not have had a **contradictory** hearing in order to determine the best interests of the child, the Ohio theory suffers even a greater weakness. It is obvious that unless a contradictory hearing is held, the best interests of the child will **always** be found to be with the ex parte applicant. Thus, persons with interest but without knowledge of the ex parte hearing will have the burdens of first discovering that such hearings have been held, and then in having the hearings re-opened in order to set forth what are the true interests of the child.

The Ohio Court states that the concept of jurisdiction announced in this case has its origin in protection of the helpless. But this child had absolutely no previous connection with the State of Ohio, did not suffer the death of his parents in Ohio, had never lived in Ohio, was not in any way a public charge in Ohio, but was designedly **taken** into Ohio by Mrs. Toth. She was given possession of the child by the Army undoubtedly as an expediency in transporting the child to the United States. Certainly the United States Army has no power

to determine custody in cases of this kind, and it did not apply the law of domicile. The State of Louisiana submits that if anyone is helpless in this situation, it is Appellant, who has suffered delay, heartbreak and expense because of a technical, tenuous and novel theory announced by the Supreme Court of Ohio.

The Supreme Court of Ohio stated in its reasons, "we do not, of course, suggest that the location of the child's domicile is unimportant in deciding the merits of a custody case. Indeed, it may be of prime importance in a decision as to which of **two competing persons** is to be granted the custody. (Emphasis added). However, these considerations go to the **merits** of the case and not to **jurisdiction,** which was the basis of the Court of Appeals judgment."

If the best interests of the child are to be considered as the basis of jurisdiction, and if the best interests are to be determined in an ex parte proceeding, there are not two persons competing for custody, and under the Ohio theory, **jurisdiction** will always attach. The unworkable practical aspects of this theory seem obvious. "Jurisdiction" means the power of a court to act, as distinguished from reaching a decision made after consideration of all of the facts. How could the Probate Court know all of the facts in this case? How could the best interests of the child be known? Yet under the Ohio theory, the domicile of the child (the traditional test of jurisdiction) is referred to the merits of the case, and a consid ration of the best interests of the child (the traditional test on

the merits of the case), becomes the basis of jurisdiction, in spite of the fact that only one party is before the Court!

Finally, under the Ohio theory, the physical presence of a child within a state not only gives that state jurisdiction, but gives that state **exclusive jurisdiction.** This is because the Ohio Court refuses to give full faith and credit to the judgment of the Louisiana court of domicile.

The Supreme Court of Ohio stated, "The final claim of petitioner is that the Full Faith and Credit Clause of the Constitution of the United States (Section 1, Article IV) requires us to give such credit to the Louisiana decree of 'tutorship' as will preclude us from giving any effect to the order of the Probate Court of Cuyahoga County. The Louisiana decree was entered without jurisdiction over the person of the respondent or the child. We are, therefore, not required to give such effect to that decree as to require the respondent to deliver the child to the petitioner. This is the philosophy underlying *May v. Anderson*, 345 U.S. 528, 97 L. Ed. 1221, 73 S. Ct. 840. See also *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N.E. (2d) 172; *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903."

The Supreme Court of Ohio thus holds that jurisdiction arises because of physical presence of the child, and because the child was not physically present in the State of its domicile, Louisiana does not have jurisdiction. Of course, the child was not physically present

in Louisiana because he had been taken to Ohio by Mrs. Toth. We thus return to tribal rules of possession. This theory is no modern concept of what is best for the child, but represents the most primitive of concepts. The practical result is that fortuitous circumstances, giving rise to the practice of stealth and stratagem, are rewarded under the Ohio theory by virtue of exclusive jurisdiction in the place where the child is finally taken.

FULL FAITH AND CREDIT HAS BEEN DENIED BY THE SUPREME COURT OF OHIO

Article IV, Section 1, of the Constitution of the United States provides in part:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. * * *"

Against this Constitutional command, the Ohio Court states that no faith and credit is given the Louisiana decree because Louisiana did not have jurisdiction over the person of the child or of respondent.

As stated in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 80 L. Ed. 220, 56 S. Ct. 229 (1935),

> "The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation

might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged."

What are the rights under Louisiana law enjoyed by appellant which have been denied? The following are articles of the Civil Code of Louisiana, introduced in evidence in the trial court:

> Article 307: "The appointment, recognition or confirmation of tutors must be made by the judge of the parish where the minor has his domicile, if he has a domicile in the State * *."
>
> Article 263: "When a tutor has not been appointed to the minor by father or mother dying last, or if the tutor thus appointed has not been confirmed or has been excused, then the judge ought to appoint to the tutorship the nearest ascendant in the direct line of the minor."
>
> Article 266: "The grandmother of the minor is the only woman who has a right to claim the tutorship by the effect of the law, but she is not compelled to accept it."

These and other articles of the Civil Code of Louisiana create vested rights of citizens of Louisiana, govern their status, and should be applied as against all the world. That statutes are "public acts" entitled to Full Faith and Credit is no longer questioned. *Bradford Electric Light Co. Inc. v. Clapper*, N.H.

1932, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571. The moment that the parents of this child died, the foregoing articles of the Civil Code of Louisiana were applicable. Moreover, a judgment of the court of this child's domicile qualified Appellant as tutrix of the child in accordance with these and other applicable Louisiana statutes.

The Supreme Court of Ohio has arbitrarily chosen to ignore these statutes and judgment. But the power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution, and a State cannot escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction in such cases to Courts otherwise competent. See the opinion of Mr. Justice Brandeis in *Broderick v. Rosner*, 294 U.S. 629, 79 L. Ed. 1100, 55 S. Ct. 589.

Nor are the cases of *May v. Anderson*, 345 U. S. 528, 97 L. Ed. 1221, 73 S. Ct. 840 and *New York, ex. rel. Halvey v. Halvey*, 330 U.S. 610, 91 L. Ed. 1133, 67 S. Ct. 903, persuasive or controlling in the instant case. Both were divorce cases involving the struggle **between parents** as to the custody of the children and the award of custody was an integral part of the divorce action in each case. Unlike the instant case, in the *Halvey* case, supra, all parties were before the trial court on a hearing on the **merits** of the case. Unlike the instant case, *May v. Anderson*, supra, was

limited to a struggle between parents.

In *May v. Anderson*, contrary to the opinion of the Supreme Court of Ohio, no "philosophy" underlay the decision. Mr. Justice Burton, the organ of this Court, was specific in noting that a narrow issue was presented. Mr. Justice Frankfurter, in his concurring opinion, stated that the decision was limited to the circumstances before this Court in that case. Justices Jackson and Reed dissented from the holding even under the limits imposed by this Court. It is clear that *May v. Anderson* is not a precedent for this case.

CONCLUSION

As stated in the opinion of the Court of Appeals below,

> "In the case here being considered, it must be remembered that the controversy is not between parents. As is indicated in the annotation just cited (the Court had referred to the annotation in 4 ALR 2d 7), many times in disputes between husband and wife or in protecting an abandoned child, residence is sufficient to vest a court with jurisdiction. The legal right to the custody or the responsibility for the support and care of Donald Peter Fore as between the remaining members of his family has never been the subject of an action before a court of competent jurisdiction. The respondent just took the child without legal right or authority and with total indifference to all others equally entitled or with prior right to be considered in a proper

action to be adjudged the guardian of such minor child."

The State of Louisiana submits that the decision of the Supreme Court of Ohio, if left untouched, will constitute an ill-considered and dangerous precedent with heartbreaking consequences to the families of men and women serving in the armed forces of the United States. The State of Louisiana respectfully urges this Court to reverse the judgment appealed from, and to reinstate the decree of the Court of Appeals for Cuyahoga County, Ohio, awarding custody of the minor, Donald Peter Fore, to his grandmother, Mrs. Ella V. Fore, Appellant, duly qualified tutrix of the child by virtue of the judgment of the Fifth Judicial District Court, Parish of Franklin, State of Louisiana.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General of the
State of Louisiana.

Appearing Amicus Curiae
in support of Appellant,
Mrs. Ella V. Fore

PROOF OF SERVICE

I, Jack P. F. Gremillion, Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, certify that on the _____ day of April, 1959, I served a copy of the foregoing motion to file brief and brief as amicus curiae in support of Appellant on Charles C. Redmond, Esquire, 719 National City Bank Building, Cleveland 14, Ohio, attorney of record for Appellee, by depositing a copy of same in the United States air mail, with sufficient prepaid postage attached.

Baton Rouge, Louisiana, April _____, 1959.

JACK P. F. GREMILLION,
Attorney General of the State of Louisiana.